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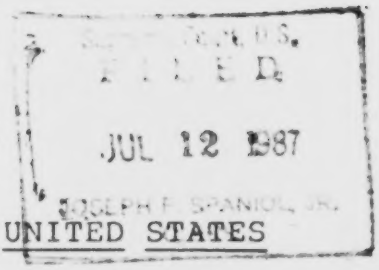

THE SUPREME COURT OF THE UNITED STATES

October, 1986 Term

MIRANDA MITZI BURTON, by her father, next friend, and natural guardian, Carlyle Burton; CARLYLE BURTON; and NATHANIEL DENMAN, Petitioners

v.

GUS WILCOX; ALLOO DARA BAPUJI PEDERSEN BURTON ADAMS; JERRY D. ADAMS; ADAM, FLAKE & HRNCIR, a Law Partnership; FRENY BAPUJI; JOHN HRNCIR; JOE E. KELLY; PHILIP E. MOKE; DON E. POLLACK; B. WELDON PONDER; TOM RICKOFF; RAUL RIVERA; ALLAN L. WATKINS; LORRAINE WELLEMS; and JOHN YATES, Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Was a pro se, out-of-state litigant in a state civil trial denied his right to put on witnesses in his behalf and was a witness denied due process and held in double jeopardy, when the state rule for sequestration of witnesses was invoked at a hearing, both his witnesses left the courtroom, and heard no testimony, and discussed none, meeting the requirements of the "Rule" but, during a recess, one of the witnesses was called into the Judge's chambers and told that the witness had violated the "Rule", was reprimanded, and an Order made that the witness would not be allowed to testify for the litigant, and at the end of the hearing, after the other unreprimanded witnesses had been allowed to testify, while walking down the corridor outside the courtroom, the reprimanded witness was verbally and physically attacked by

the lawyer for the opposition, the judge stepped out of a doorway, and ordered two bailiffs, who had not seen the attack, to take the witness to his chambers, where, without a lawyer as asked for by the witness, court reporter, notice of any charges, witnesses or time to prepare, as asked for by the witness, or warning of his Miranda rights (Texas C.C.P. 15.17), the witness was accused of attacking the opposition lawyer, told that the opposition lawyer was a friend of the judge and they had gone thru law school and Assistant District Attorneyships together, the opposition lawyer made a false statement, the witness made a recorded statement about the attack on the witness denying the accusation, the judge then stated again that the witness had violated the witness "rule" and sentenced him to three days imprisonment for violating the "rule," which chilled

the witness's ardor to travel in interstate commerce to give his testimony?

2. Did the state trial court, Appeals Court and state Supreme Court violate the Pro Se Litigant's right to an appeal when he mailed within the 30 days allowed, with a Certificate of Mailing, a Notice of Appeal and a Money Order $500 maximum Filing Fee, although he had previously paid $275 for a transcript, an approximate $180 overcharge, the Appeals Clerk lost or destroyed the $500 Money Order, the litigant sent a second notice of appeal and a letter in lieu of a Motion for Extension of Time, which was not forwarded to the appeals court, then the litigant sent another $500, in the form of a Cashier's Check, at great personal financial damage, within the 30 days, plus 15 day extension, plus three days allowed for mailing under the Texas

Rule of Civil Procedure No. 21a, and then the trial court Appeals Clerk claimed the second payment was not mailed on time, the Appeal was not docketed, the State Appeals Court denied his appeal and the Texas Supreme Court refused to review the case?

3. Was the pro se litigant denied equal protection of the law when he was required to provide first a Money Order, then a Cashier's Check, for the appeal costs although lawyers' personal checks were accepted as payment by the Appeals Clerk?

4. Was the state trial court's practice of falsely informing pro se Litigants that the verbal order of the trial court had not been entered, and that the Pro Se Litigants could not file appeals until the order was entered, a violation of due process of law?

5. Since the Texas Appeals Courts have

ruled that litigants cannot be forced to pay opponents' legal fees by threat of imprisonment for contempt, was extortionate pressure brought on the Litigant by the trial judge's order that he pay the opponent's legal fees in 30 days or go to jail and the Trial Court Clerk's informing the Litigant for 30 days that the legal fees order had not been entered, and the state appeal court would not allow him to file a Notice of Appeal or Motion for Stay of Execution until the Order had been entered?

6. Did the District Court err in dismissing, with prejudice, a pro se Further Amended Verified Complaint that claimed violation of 28 U.S. Code, Sec. 1738A and V.T.C.A. Texas Family Code Sections 11.05 (g), 11.52 (2,5,10,11), ruled enforcible in United States Courts by the Fifth Circuit, and state torts against the pro se plaintiffs which could

be considered under the pendent jurisdiction principle and diversity of citizenship [all the plaintiffs had different state residency from all the defendants], including the claim of intentional infliction of emotional distress caused by one of the defendants taking the child plaintiff out of the state and concealing the child, to this date, from the plaintiff parent, denying both the parent and the child the court ordered mutual care, company, love and affection to which they are entitled?

7. Since the defendants committed several acts to injure the plaintiffs, within a 10-year period, for which they could be indicted under state or federal law and the plaintiffs were Pro Se, did the District Court err in not finding that it had jurisdiction of the Complaint under the "RICO" Act, 18 USC Sec. 1961?

B. TABLE OF CONTENTS

	Page
A. Questions Presented for Review	1
B. Table of Contents	7
C. Table of Authorities	7
D. Reports of the Decisions below	10
E. Grounds on which Jurisdiction of this Court is Invoked	10
F. Constitutional provisions, U.S. Statutes, and Texas Constitutional provisions and statute involved ...	11
G. Statement of the Case	24
H. Argument	39

C. TABLE OF AUTHORITIES

Case	Page
Armco Industrial Credit Corp. v. SLT Warehouse CO., 782 F.2d 475 (1986, 5 C.A.)	53
Couture v. Hyatt, 774 F.2d 1350 (1985, 5 C.A.)	54
Crowe v. Lucas, 595 F.2d 985, 993 (1979, 5 C.A.)	46
Cunningham v. Ingram, __ F.Supp. __	43
Davis v. Broughton, 382 S.W.2d 219	49
Escobedo v. Illinois, 378 U.S. 478	41

Gault, Application of,
87 S.Ct. 1428, 1435 ..... 39, 41, 47

Griffen v. Breckenridge,
91 S.Ct. 1790 43

Griffen v. Illinois
76 S.Ct. 585 (1956) 47

Haines v. Kerner,
92 S.Ct. 594 (1972) 48

Heartfield v. Heartfield,
749 F.2d 1 138 (1985, 5 C.A.) .. 51

Hoffman-La Roche v. Greenberg,
447 F.2d 872, 875 45

Holstien v. Grier,
262 S.W.2d 954 (1954) 40

Howell Petroleum Corp. v. Weaver,
776 F.2d 1302 (1985, 5 C.A.) ... 53

Hunt v. Weatherbee,
626 F. Supp. 1097 (1986) 54

James v. Mienke,
778 F.2d 200 (1985, 5 C.A.) .. 53

Mayberry v. Penna., 91 S.Ct. 499 42

Miranda v. Arizona,
86 S.Ct. 1602 41

Picking v. Penna.,
151 F.2d 240 (1945, 3 C.A.) 48

Prevost, Ex Parte,
598 S.W.2d 310, (1979), ... 35, 49

Puckett v. Cox,
456 F.2d 233, (1972, 6 C.A.) 48

Pulliam v. Allen, 104 S.Ct. 1970 52

Raftery v. Scott,
756 F.2d 335 (1985, 4 C.A.) .. 41, 53

Ridgeway v. Baker,
720 F.2d 1409, 1415 (1983, 5 C.A.)
..... 41, 51

Sedima SPRL v. Imrex Co. Inc.,
105 S.Ct. 3275 53

U.S. v. Price,
86 S.Ct. 1152, 1156, F.N.#7 44

Statute Page

5th Amendment 12

6th Amendment 12, 41

14th Amendment 12, 41, 49

15 U.S.C. 1 36

18 U.S.C. 1961 ..... 6, 37, 53

18 U.S.C. 1962 ..... 37, 53

28 U.S.C. 1254 11

28 U.S.C. 1738A 5, 13, 37, 38, 51

42 U.S.C. 1983 ..... 15, 36

42 U.S.C. 1985 ..... 15, 36

42 U.S.C. 1986 36

42 U.S.C. 1988 ..... 17, 36

Texas Rule of Civil Procedure #21a
..... 4, 22, 33

Texas Rule of Civil Procedure #267
a.k.a. "Rule"
..... 1, 2, 22, 26, 27, 30, 40, 41

Texas Code of Criminal Procedure 14.01
..... 18, 44, 45

Texas Code of Criminal Procedure 14.02
..... 18, 44, 45

Texas Code of Criminal Procedure 15.17
..... 2, 19

Texas Civil Statute 320a-1 21

D. REPORTS OF DECISIONS BELOW

The final decision of the United States District Court in Burton, et al v. Wilcox, et al, No. SA-81-CA-275 was not reported. The Decision of the United States Court of Appeals for the 5th Circuit in the Appeal Burton et al v. Wilcox et al, was ordered not to be reported. They are reproduced in the Appendix, as is the Denial of the Petition for Rehearing.

E. GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) The Order of the United States

District Court for the Western District of Texas dismissing the action with prejudice was entered May 15, 1985.

(ii). The Order of the United States Court of Appeals for the 5th Circuit affirming the judgment of the United States District Court without hearing was dated June 30, 1986 and entered August 15, 1986.

(iii). The Order denying the Appellants' Motion for Rehearing was dated August 15, 1986 and entered August 15, 1986, the Mandate was issued on August 18, 1986. This Court granted an extension of time in which to petition for certiorari to December 12, 1986.

(iv). Title 28, U.S. Code, Section 1254 confers jurisdiction on this Court to review the Mandate and other decisions of the United States Court of Appeals.

F. CONSTITUTIONAL PROVISIONS, U.S. STATUTES, AND TEXAS CONSTITUTIONAL PROVISIONS

AND STATUTES INVOLVED.

1. United States Constitution Articles and Amendments

Article VI. Section 3. .... all executive and judicial officers, both of the United States,and the of the several states shall be bound by oath or affirmation to support this Constitution,

....

Amendment V. ..., nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,

...

Amendment XIV. Section I. .... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

2. TITLE 28, UNITED STATES CODE

Section 1738A - Parental Kidnapping Prevention Act

(a) The appropriate authorities of every State shall enforce according to its terms and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

....

(c) A child custody determination made by a court of a State is consistent iwth the provisions of this section only if --

(1) such court has jurisdiction under the law of such state; and

(2) one of the following conditions is met:

(A) Such state (i) is the home state of the child on the date of the commencement of the proceedings, ... and the child is absent from such State because of his removal or retention by a contestant or

for other reasons, and a contestant continues to live in such State; ....

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as longs as the requirement of subsection (c) (1) of this section continues to be met and such State remains the residence of the child or of any contestent.

(e) Before a child custody determination is made, reasonable notice and opportunity to beheard shall be given to the contestants, ... and any person who as physical custody of the child,

(g) A court of a State shall not exercise jurisdiction in any ... custody determination commenced during the pendency of a proceeding in a court of another State where such court of that State is exercising jurisdicition consistently with the provisions of this

section ....

3. TITLE 42, UNITED STATES CODE

Section 1983 - Civil Action For Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985 - Conspiracy to Interfere in Civil Rights

(2) Obstructing justice; intimidating party, witness, or juror. ....; or if two or more persons conspire for the purpose of impeding, hindering,

obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the law.

(3) Depriving persons of rights or privileges.

If two or more persons in any state or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of any equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or Territory from giving or securing to all persons within such State

or Territory equal protection of the laws; ....; in any case of conspiracy set forth in the section, if one or more persons engaged therein do, or cause to be done, any act in furtherance or the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 1988 - Proceedings in Vindication of Civil Rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication,

shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil and criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

4. TEXAS CODE OF CRIMINAL PROCEDURE- ARTICLE 14.01 - Offense Within View

(a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.

(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

ARTICLE 14.02 - Within View of Magistrate

A peace officer may arrest, without warrant, when a felony or breach of the peace has been committed in the presence or within the view of a magistrate, and such magistrate verbally orders the arrest of the offender.

ARTICLE 15.17 Duties of Arresting Officer and Magistrate

(A) In each case enumerated in this Code, the person making the arrest shall without necessary delay take the person

arrested or have him taken before some magistrate of the county where the accused was arrested. The magistrate shall inform in clear language the person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to have an examining trial. He shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall

admit the person arrested to bail if allowed by law.

5. TEXAS CIVIL STATUTES

ARTICLE 320a-1 - State Bar Act

Section 2. The State Bar of Texas established under the laws of this state is continued as a public corporation and an administrative agency of the judicial department of government. It is designated as the State Bar. This legislation is in aid of the judicial department's powers under the constitution to regulate the practice of law and not to the exclusion of those powers. The Supreme Court of Texas, on behalf of the judicial department, shall exercise administrative control over the State Bar under this Act.

Section 4. - Seal; suits and contracts; gifts.

The State Bar may sue and be sued in its own name. For the purpose of carrying into effect and promoting objectives of

this Act, the State Bar may enter into contracts and do all other acts incidental to the foregoing that are necessary or expedient for the administration of its affairs and the attainment of its purposes. ....

6. TEXAS RULES OF CIVIL PROCEDURE

Rule #21a - Notice.

..... Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. .....

Rule #267 - Witnesses Placed Under the Rule

At the request of either party, in a civil case, the witnesses on both sides may be sworn and removed out of the court room to some place where they cannot hear the testimony as delivered by any

other witness in the cause. This is termed placing witnesses under the rule. Neither party to the suit shall be placed under the rule. Where a corporation is a party to the suit, the court may exempt from the rule an officer or other representative of such corporation to aid counsel in the presentation of the case. If any party be absent the court in its discretion may exempt from the rule a representative of such party. Witnesses, when placed under the rule, shall be instructed by the court that they are not to converse with each other or with any person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. Any person violating such instructions may be punished for contempt of court.

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G. STATEMENT OF THE CASE.

(1) Facts of the Case.

As stated in the Verified Further Amended Complaint, Respondent Alloo Dara Bapuji Pedersen Burton Adams, hereinafter Alloo Adams, took Petitioner Miranda Burton, hereinafter the minor child, daughter of Petitioner Carlyle Burton, hereinafter Burton, from Georgia to England, disobeying the Georgia court order providing for visitation between Burton and his 5-year old daughter. When Burton went to England in 1976, to see his child, who was alleged to have English citizenship, he was allowed only 1 hour per day with his child, in the presence of Respondent Alloo Adams, contrary to the court order for visitation, after he was forced to loan Respondent Alloo Adams $2,200 to get to see his child, which sum Alloo Adams has refused to fully repay. After his return

to Air Force duty in Georgia, Respondent Alloo Adams wrote false statements to his Commanding Officer in an attempt to have him punished by discharge, demotion or other punishment. Burton retired from the Air Force in 1979, and moved to Connecticut. Respondent Gus Wilcox, hereinafter Wilcox, filed a motion in the Bexar county divorce court for an increase in child support payments, without adequate notice to Burton. He retained a Texas lawyer, Respondent B. Weldon Ponder, who failed to tell Burton he could enforce the favorable Georgia court order in Texas, but instead had him submit to the jurisdiction of the Bexar County, Texas divorce court in order to get reasonable visitation with his child. Respondent Ponder only filed a general answer to the motion, and failed to protest the inadequate notice of the motion. Burton could not afford other

counsel, so Burton had to proceed pro se.

On January 26, 1981, Burton accompanied by his wife, Patricia Burton, and Petitioner Nathaniel Denman, of Massachusetts, went to the Bexar County Texas Courthouse, and they observed Respondent Wilcox go to the assignment clerk's desk and shift case folders about. It was then announced that the case had been assigned to Respondent Judge John Yates, hereinafter Yates, for trial. As soon as the hearing commenced, Respondent Wilcox stated he was invoking the "Rule", which the Petitioners learned later was T.R.C.P. #267. Without any explanation of what the Rule was, Respondent Yates ordered Petitioner Denman and Patricia Burton out of the courtroom before any evidence had been presented. Denman and Patricia Burton did not discuss any evidence while waiting out in the corridor to be called.

In the courtroom, Respondent Wilcox prompted his witness, Respondent Alloo Adams, while she was on the stand under oath, passed her notes on the stand, and interrupted Burton in his testimony, protested by Burton, all without correction from Respondent Yates.

During the recess for lunch, Respondent Yates and Respondent Wilcox took Burton to the court chambers and threatened him with reduced visitation and increased support if he did not agree to an immediate settlement of the case. When Burton refused, Respondent Yates ordered Denman brought into his chambers from the courthouse corridor, informed him that he had violated the "Rule"; Denman stated that he could not have, and did not, discuss any evidence with Patricia Burton, but Respondent Yates was adamant, reprimanded Denman, and ordered that Burton was denied Denman's

testimony.

The hearing continued in the afternoon, with further interruptions and prompting of witnesses by Respondent Wilcox. After the testimony, Respondent Yates announced that he would rule that Burton must pay $250.00 per month child support, up from $150.00, and ordered Burton to pay attorney fees of $300.00 to Respondent Wilcox, increased the visitation, and stated that Respondent Wilcox was to write the order.

In the corridor, late in the afternoon after the hearing, Respondent Wilcox started talking to Burton and Denman, and made false statements about Denman, Denman asked him to retract them, and Respondent Wilcox attacked Denman, shoving him off balance and attempting to strangle him with his tie. Court spectators and Burton separated them; Respondent Yates then appeared out of the

courtroom doorway, and instructed Bailiff Respondent Moke, hereinafter Moke, who had not seen the incident, but started an investigation of the incident as a deputy sheriff, to take Denman into custody, and into 'the Judge's chambers, where Respondent Yates, in the presence of Respondent Wilcox {who had not been required or requested to come along}, after the Bailiff left, told Denman that he and Respondent Wilcox had been very good friends for years, had gone to law school together, been Bexar County Assistant District Attorneys together, and that he was not going to allow Denman to interfere. He then had Respondent Wilcox make a statement. without recording Respondent Wilcox's false statements, and, without warning of any Miranda Rights, told Denman to make a statement. A court reporter, Respondent Don Pollack, hereinafter Pollack, was

brought in and Denman made a statement, correcting Respondent Wilcox's statement about what happened in the courthouse corridor. Respondent Yates then criticized Denman again for violating the "Rule" about sequestered witnesses, and sentenced Denman to three days imprisonment for violating the "Rule". Denman pointed out that he wanted to appeal and move for stay of execution of the sentence pending appeal, but Respondent Yates stated that he would have to serve the sentence immediately. Respondent Watkins arrived in the Jury room and begin to assist Respondent Moke in preparation of Denman for jail when Denman was taken to the unused jury room by Respondent Moke and ordered to give up his belt, tie and all funds. Denman did so, and "informed" the Respondents/ Defendants Moke and Watkins of two previous incidents of false arrest and

unconstitutional detention which Denman, in the course of his civil rights work, had taken to Federal court and won. One of the bailiff left the jury room, and came back, stating the Judge (Respondent Yates) wanted to see him (Denman) again; Denman went, sans belt and tie. Respondent Yates informed him that he had reconsidered, and would not require Denman to serve the three days if he "apologized" to Respondent Wilcox. Denman, who had obtained scarce reservations from San Antonio to Mexico City to see his son, daughter-in-law, and granddaughter Iolante, who he hadn't seen in over two years, and his new granddaughter, Tanya, he had never seen, and in fear of additional false charges and incarceration, was coerced into agreeing.

Burton returned to Connecticut, and, failing to get the copy of the Order

Respondent Wilcox was ordered to prepare and send to Burton for acceptance as to form, called the Bexar County District Clerk's office often, to find out if the Order had been filed; each time he was told it hadn't been filed. The order was filed February 11, 1981, despite recorded telephone statements from the Bexar County indexing clerk that the Order had not been filed and entered, and that Burton, unlike lawyers, could not deposit a personal check for the appeal costs. Burton then filed by mail, with a Certificate of Mailing, a notice of appeal accompanied by a Money Order for $500.00 on February 27, 1982, although the $500.00 was more than he was supposed to pay. The Appeals Clerk, Respondent Wellems, hereinafter Wellems, stated she had not received a "Money Order" for $500.00, and Burton, within 30 days plus 15 days extension of time plus 3 days for

service by mail as allowed in the Texas Rules of Civil Procedure, No. 21a, mailed a second notice of appeal and letter in lieu of Motion for Extension of Time to file the costs. No action was ever taken on the Motion for Extension of Time in the Texas courts. On March 27, 1981, Burton mailed a timely Cashier's Check for $500.00, secured at great financial hardship. Respondent Pollack, the court reporter, charged $2.75 per page, when the lawful charge was $.84 per page for the transcript of the hearing of January 26, 1981 and Denman's second "trial". This was another financial hardship on Burton, who was earning a modest income as a computer programmer.

Respondent Wellems and Bexar County District Clerk Tom Rickoff, hereinafter Rickoff, refused to file the Notice of Appeal, and Burton appealed this to the Texas Appeals Court, where his appeal was

denied because of his alleged failure to pay the $500.00 on time. Burton sought a Writ of Error from the Texas Supreme Court, which was denied without comment.

Burton and his wife, Patricia Burton, moved from Connecticut to Texas to be near his daughter because of the continued denial of court ordered visitation and filed a writ of habeas corpus to gain visitation with his daughter. Respondent attorney John Hrncir, hereinafter Hrncir, and Respondent Judge Joe Kelly, hereinafter Kelly, denied the application for writ of habeas corpus without allowing the entry of evidence. Prior to court beginning Burton saw Respondent Hrncir leave the court chambers of Respondent Kelly only seconds before Respondent Kelly went to the courtroom and denied the application for writ of habeas corpus.

Prior to the beginning of a hearing before Respondent Judge Raul Rivera, hereinafter Rivera, Burton saw Respondent Wilcox exit the chambers of Respondent Rivera just prior to the contempt being assigned to Rivera on September 10, 1981. Burton attempted to invoke the principle that he could not be forced to pay the ordered lawyer's fee by threat of jail, but this was denied, and he was ordered to pay an attorney's fee to Respondent Wilcox within 30 days on pain of jail. Burton sought to appeal, under the ruling of Ex Parte Prevost, 598 S.W.2d 310 (1979), that he could not be held in contempt for nonpayment of legal fees, but was told that he could not file the notice of appeal until the Order of Respondent Rivera was entered, and it had not been entered. On the 29th day of his grace period, in fear of losing his job and because of his poor health, he paid

the legal fees, and Rivera's order was entered, but changed, deleting the order that Burton pay the legal fee.

(2) Statement of the Proceedings in the Courts Below.

On May 29, 1981, Burton, on behalf of himself and his daughter Miranda, then 7 years old and his wife, Patricia, and Denman filed suit in the United States District Court, Western District of Texas, San Antonio Division, seeking redress of these grievances, against the defendants, all residing in Texas. The adult Burtons resided in Connecticut, Miranda had English citizenship, and Denman is a Massachusetts resident. The Verified Complaint, and the later amended Complaints, which were all verified by affidavit, made claims for injunctive relief and money damages under 42 U.S.C. Sections, 1983, 1985, 1986 and 1988 and Title 15 U.S.C. Sections 1 et seq. Sufficient factual statements were made

showing the District Court also had diversity jurisdiction and jurisdiction under the R.I.C.O. Act, 18 U.S.C. 1961, 1962. On December 7, 1981, a hearing on defendants' motions to dismiss was held. Later the presiding United States District Judge disqualified himself and the plaintiffs submitted a Verified Amended Complaint.

Respondent Alloo Adams then disappeared with Petitioner Miranda Burton, in February 1982, and is believed to have gone to Alaska, violating the court-ordered visitation between Petitioners Carlyle and Miranda Burton, and 28 U.S.C. 1738A. Defendant Jerry Adams went to Hawaii. Plaintiffs stated this in a Verified Further Amended Complaint, which was accepted by the District Court. Petitioner Burton was told that a state habeas corpus action could not be brought against Respondent

Alloo Adams to require that Petitioner Miranda Burton be returned to Texas without personal service on Respondent Alloo Adams, which was impossible, her whereabouts being unknown.

Petitioner Burton and his wife, Patricia, sought to locate petitioner Miranda Burton, but have been unsuccessful to date. They were not allowed to have Respondent Alloo Adams, represented in the state and federal courts by Respondent Wilcox, charged with failure to return Miranda to the District Court's jurisdiction, although 28 U.S.Code, Section. 1738A provided for enforcement of the Texas Family Court orders in Texas.

On November 1, 1984, attorneys for Defendants/Respondent Moke and Watkins had an unrecorded ex parte "conference" lasting an hour with the District Judge's law clerk, of which none of the

Petitioners were notified, and the next day, November 2, 1984, a United States Magistrate was assigned the case for review. He recommended that the Verified Amended Complaint be dismissed, although it had been superseded by the Verified Further Amended Complaint. Plaintiffs filed an opposition to the recommendation, but, without a hearing, the Verified Further Amended Complaint was dismissed with prejudice; the plaintiffs appealed and the appeal was denied without a hearing. Plaintiffs/ Appellants petitioned for rehearing, and this was denied.

H. ARGUMENT

QUESTION 1 ARGUMENTS

A litigant has a due process right to the testimony of witnesses in his behalf. Application of Gault, 87 S. Ct. 1428, 1435. Burton and his daughter

Miranda, were denied this right when his witness, Denman, was wrongfully accused of violating Texas Rules of Civil Procedure No. 267, (the "Rule"), by discussing testimony Denman had never heard, since he was excluded from the courtroom before the testimony began. Also, it has been ruled in Texas that the litigant is not to be punished for any alleged wrongdoing of a witness under the "Rule" (Holstien v. Grier, 262 S.W.2d 954 (1954)). Burton was wrongfully denied testimony from Denman; Burton was not permitted in the chambers to protect his rights, pro se, and the US District Court should have set aside the state court decision for these denials, rather than dismissing the federal complaint.

Denman was improperly punished by a reprimand, in his first "in chambers" hearing because he had not violated the rule. In the second "trial" of Denman, he

was again denied counsel ((Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 86 S.Ct. 1602 (1966); Ridgway v. Baker, 720 F.2d 1409 (1983, 5 C.A.}); notice, any production of witnesses in his behalf, a transcript of all proceedings, and an effective appeal (Application of Gault, supra, at 1435.) He was held in double jeopardy of the alleged "Rule" violation, contrary to the 6th Amendment, made binding on the States by the 14th Amendment. This was the intentional infliction of emotional distress, as was the taking of his belt, tie, and money, and the sentence of 3 days imprisonment. Raftery v. Scott, 756 F. 2d 335.

Respondent Yates' informing Denman that he and Respondent Wilcox had gone to law school together, and were Assistant District Attorneys together, and were very good friends, and that Yates was

displeased with Denman for acting contrary to Wilcox's interests by attempting to help a pro se litigant, Burton, was also very emotionally painful to Denman, since Denman was aware that Yates should have disqualified himself before the Burton trial, under Mayberry v. Penna, 91 S Ct 499.

The denial of a "impartial tribunal" to Burton, after Wilcox's shifting of the case folders on the assignment clerk's desk, was an overt act in the conspiracy to deny Burton (and Denman) due process of law. The offer of vacation or suspension of the unjust sentence did not mitigate the emotional distress of Denman, who was shocked more than the average person, since he had participated in several civil rights causes, including voting rights work in the South (See Congressional Record, Jan. 17, 1963) and was aware of not only his rights, but of

the distressing effect on litigants' and children's rights in general if the actions of Yates and Wilcox were not corrected. The District Court should have permitted the Burtons and Denman to prove these verified allegations in discovery and trial. The plaintiffs should have been permitted to prove at trial that the illegal and unconstitutional behavior of Yates and Wilcox was also done to discourage Denman and chill his ardor to give testimony, Cunningham v. Ingram ____ F. Supp. ____, and Griffin v. Breckinridge, 91 S.Ct. 1790. This Court should take into consideration that what was done to Burton and Denman by Wilcox and Yates, and to Burton by Respondents J. Riviera and Wilcox, in a small way was what Deputy Sheriff Price and his civilian henchmen did to discourage the brave young people who were helping blacks to register to vote in the South.

U. S. v Price, 86 S. Ct. 1152, 1156, footnote 7.

The United States Court of Appeals for the 5th Circuit, in its review of the facts, stated that there was a "scuffle" in the hallway. Denman should have been permitted to prove at a trial that Respondent Wilcox had attacked him with no justification, instead of having the Complaint dismissed with prejudice.

Respondents Bailiff Moke and Watkins had no written authority to take Denman to jail, as required by Texas Code of Criminal Procedure C.C.P. 14.01 and 14.02. They had not witnessed the incident in the corridor, and since court was not in session, and certainly not held in a corridor, they should have declined to take Denman into custody, but required Yates or Wilcox or Denman to swear out a complaint according to Texas

law for misdemeanors, since the act was not witnessed as required by C.C.P. 14.01 and 14.02, or permitted Denman an opportunity to swear out a cross complaint. Since they were Bailiffs and Deputy Sheriffs, they should have been held responsible, in the U.S. District Court, to a knowledge of Texas criminal law that made their actions illegal. They knew, or should have known, that Respondent Yates could not be a witness, then instant prosecutor, then instant court clerk issuing a nonexistent criminal complaint and warrant against Denman, then prosecutor and judge and jury (Denman was never asked if he waived the right to trial by jury), and that even if Yates could do all that, he should have given Denman some opportunity to obtain counsel, witnesses, and research the law as best he could before he was tried. That the bailiffs went

along with this travesty shows that at least a tacit understanding, a conspiracy, existed. Denman and Burton should have been given the opportunity, by the District Court, to show that the defendants agreed to commit an illegal act(s).

> "This requirement must often be met by circumstantial evidence; conspirators rarely formulate their plans in ways susceptible of proof by direct evidence. Hoffman-La Roche v. Greenberg, 447 F. 2d 872, 875 ... From this evidence and the testimony regarding the defendants' course of conduct toward Crowe, the jury could reasonably have inferred that a conspiracy existed." Crowe v. Lucas 595 F. 2d 985, 993 (5th Cir. 1979).

The 5th Circuit should give the Burtons and Denman the same opportunity to prove to the jury that a conspiracy existed. That Denman was denied a transcript of all proceedings against him is indisputable, and therefore the 5th Circuit dismissal should be reversed.

Griffin v. State of Illinois 76 S.Ct. 585 (1956).

QUESTION 2 ARGUMENT.

Since the Appeals Clerk, Respondent Wellems, refused to accept the second $500 mailed in the form of a Cashier's check, in the 30 days allowed for receipt of the appeals costs, and stated that she had never received a "Money Order" while claiming no knowledge that the first appeal costs payment was in the form of a Money Order, it is obvious that plaintiffs might be able to prove, to a jury, that the Appeals Clerk had improperly received or concealed the first payment of the appeals cost, and deliberately misapplied the rules by denying the appeal notice and costs were filed on time. The Appeals Court, by denying the appeal because the notice was allegedly not filed in time, also ignored the "3 days extra for notice by mail"

Rule unconstitutionally, denying Burton his due process right of appeal. Application of Gault, Supra.

QUESTIONS 3 and 4 ARGUMENT.

Since the pro se prospective appellant's personal check was not accepted by the Appeals Clerk, Wellems, when she accepted personal checks for "cost bonds" and other filing fees from lawyers, and accepted personal checks from pro se Burton for payment of motion filing fees, it is obvious that she was denying Burton the equal protection of the law. Pro se's must be given at least the same consideration as lawyers (Haines v. Kerner 92 S.Ct. 594 (1972)) and pro se pleadings must be considered without regard to technicality. Picking v. Penna Ry, 151 F.2d 240 (1945, 3 C.A.); Puckett v. Cox, 456 F.2d 233, (1972, 6 C.A.). The false denial, to a pro se litigant, that the judge's decision was entered, and the

refusal to docket his notice of appeal because the Order was allegedly not entered, done to deny the pro se litigant the same treatment as a lawyer, who would not have been lied to, are forbidden by the 14th Amendment's prohibition against denial of due process and equal protection and the decisions, cited above in this paragraph, that pro se litigants must be treated like lawyers for all purposes in their own cases.

QUESTION 5 ARGUMENT.

The Texas Appeals Courts have ruled in Ex Parte Prevost, 598 S.W.2d 310, (1979), and the Missouri Supreme Court has ruled in Davis v. Broughton, 382 S.W.2d 219, that lawyers' fees are not enforcable by contempt procedures, therefore respondent Rivera's oral order, that Burton pay Respondent Wilcox a legal fee of $250.00 or be jailed for contempt, was improper. The scheme whereby Burton

was faced with extortionate pressure (the threat of jailing) if he did not pay the $250.00 legal fees in 30 days, combined with the denial of the filing of his appeal on the order and a motion for stay of execution because the "judge has not entered the order" for 29 days, out of an appeal notice period of 30 days, Burton's payment of the legal fee, and the subsequent written order deleting the oral order to pay the legal fees, were overt acts of the conspiracy to deprive a pro se litigant, on a medical pension from the Veterans Administration for multiple service-connected disabilities, of the due process right of appeal, and of his property, the $250.00 fee, illegally and unconstitutionally, and the District Court should have allowed the claims to be heard.

QUESTION 6 ARGUMENT.

The District Court should not have

dismissed with prejudice, nor the Appeals Court uphold the dismissal, of the Verified Further Amended Complaint, since it stated claims of the Verified Further Amended Complaint, since it states claims of: denial of Texas family court orders for father-daughter visitation in Texas, enforcible under 28 U.S. Code, Sec. 1738A, upheld in Heartfield v. Heartfield, 749 F.2d 1138 (1985, 5 C.A.), conflicting with the Fifth Circuit's upholding of the dismissal of the instant case; denial of witnesses; denial of counsel which the 5th Circuit forbade in contempt cases in Ridgeway v. Baker, 720 F.2d 1409, 1415 (1983); and denial of equal protection of the law, all verified by affidavit, and which were not contradicted in the affidavits submitted by Respondents Moke and Watkins.

Yates submitted no affidavit at all; his acts, including his ordering bailiff

Moke arrest Denman and take him into chambers, were entirely outside his jurisdiction, the incident he used as a pretext having taken place outside the courtroom when court was not in session and not in his view. He has no immunity for nonjudicial acts outside the courtroom, and should have none for conducting a hearing against Denman without notice, proper arrest, documentation, or jury. For those acts for which he may have judicial immunity, and which were improper, he has no immunity against the requirement that he pay attorney fees. Pulliam v. Allen, 80 L.Ed.2d 565, 104 S.Ct. 1970 (1984).

The claims against other respondents, such as false statements by Respondent Alloo Adams to Burton's commanding officer, the failure to repay the $3,000.00 loan, and most tragic, the deprivation of Miranda's care, company,

love and affection, which had been ruled as being in the best interest of Miranda (Raftery v. Scott, supra.), were all under the jurisdiction of the District Court under the pendent jurisdiction principle and because of diversity of citizenship between the plaintiffs and defendants.

QUESTION 7 ARGUMENT.

This Court has ruled, in Sedima SPRL v. Imerx Co. Inc., 105 S.Ct. 3275 that when a person suffers damage to his business or property by the defendant's indictable acts occurring within 10 years, the injured party may sue under the Racketeer Influenced and Corrupt Organization Act, hereinafter R.I.C.O. Act, 18 U.S.C. 1961-1968. The 5th Circuit has followed this decision in Armco Industrial Credit Corp. v. SLT Warehouse Co., 782 F.2d 475 (1986), James v. Mienke, 778 F.2d 200 (1985), Howell

Petroleum Corp. v. Weaver, 776 F.2d 1302 (1985) and Couture v. Hyatt, 774 F.2d 1350 (1985). The First Circuit has ruled the same in Hunt v. Weatherbee, 626 F. Supp. 1097 (Mass., 1986). The Plaintiffs/ Petitioners in the instant case have suffered in their property, including Burton's forced payment of legal fees, and their businesses, since both Burton and Denman have been forced to take time from their regular work to defend their liberty and their business and personal reputations, and therefore the District Court should have taken jurisdiction under the R.I.C.O. Act.

By the Plaintiffs, pro se

Carlyle Burton,
individually and
for Miranda Mitzi
Burton, a minor
P.O. Box 34321
San Antonio, Tx 78265

Nathaniel Denman
P.O. Box 689
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02541
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CERTIFICATE OF SERVICE

I, _____, herewith certify that I have mailed, first class, postage prepaid, __ copies of the above "Petition for Writ of Certiorari" to the last known counsel of record for the Appellees; Weldon Ponder, 1000 Capitol Center, 919 Congress Avenue, Austin, Texas 78701; District Attorney's Office, Keith Burris, Joe Frazier Brown, Michael Hodge, William Crow, Bexar County Courthouse, San Antonio, Texas, 78205; Charles L. Smith, Susan E. Callaway, 2000 Frost Bank Tower, San Antonio, Texas, 78205; Adams, Flake & Hrncir, 1001 Pat Booker Road, Suite 200, Universal City, Texas, 78148 on the ____ day of _____ 1987.

_____
Nathaniel Denman

87-90

No.....

FILED
JUL 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

THE SUPREME COURT OF THE UNITED STATES

October, 1986 Term

MIRANDA MITZI BURTON, by her father, next friend, and natural guardian, Carlyle Burton; CARLYLE BURTON; and NATHANIEL DENMAN, Petitioners

v.

GUS WILCOX; ALLOO DARA BAPUJI PEDERSEN BURTON ADAMS; JERRY D. ADAMS; ADAM, FLAKE & HRNCIR, a Law Partnership; FRENY BAPUJI; JOHN HRNCIR; JOE E. KELLY; PHILIP E. MOKE; DON E. POLLACK; B. WELDON PONDER; TOM RICKOFF; RAUL RIVERA; ALLAN L. WATKINS; LORRAINE WELLEMS; and JOHN YATES, Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX FOR PETITIONERS

Carlyle Burton,
Miranda Mitzi Burton
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Nathaniel Denman
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02541

TABLE OF CONTENTS
APPENDIX

TABLE OF CONTENTS 1

ORDER OF UNITED STATES DISTRICT COURT . 2

JUDGMENT OF UNITED STATES
DISTRICT COURT 6

FINDINGS OF UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT 7

ORDER ON PETITION FOR REHEARING 26

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MIRANDA BURTON, ET AL.,)
)
Plaintiffs,)
)
v.)
)
GUS WILCOX, ET AL.,)
)
Defendants.)

ORDER

ON THIS DATE came on to be considered the verified further amended complaint filed by the Plaintiffs in this cause alleging various violations of the United States Constitution and the Federal Civil Rights Act.

This action has a long history and has been considered by several past and present Judges of this Court. The matter was referred to the Honorable Robert B. O'Connor, United States Magistrate, for his review aand recomendation and on December 5, 1984, the Magistrate filed his findings and recomendation through

which he recommended that the Plaintiffs' complaint be dismissed as to all Defendants. The Plaintiffs filed objections to the Magistrate's findings and recomendation and because this Court agreed with the Plaintiffs that the Magistrate had failed to consider the Plaintiffs' verified further amended complaint, the matter was remanded to the Magistrate for additional findings. The Magistrate submitted his supplemental findings and recomendation on March 25, 1985, through which he again recomended that the Plaintiffs' complaint be dismissed with prejudice. The Plaintiffs' again have filed objections to the Magistrate's findings and recommendation and consequently this Court has conducted a de novo review of the entire record and file in this cause. Having conducted its de novo review, this Court is convinced that the Magistrate is correct in his

recommendation that this complaint should be dismissed, with prejudice, as to all Defendants.

As to Defendants Rivera and Kelly, this Court believes that this cause should be dismissed against those Defendants for the same reason as the Magistrate has recomended that this cause be dismissed against Defendant Yates. In addition, this Court believes that the Plaintiffs have failed to make any allegation that Defendant Bapuji acted under color of law and thus believes that this cause should be dismissed as to that Defendant.

This Court will adopt both the original and supplemental findings and recomendation of the Magistrate as its own findings and will dismiss this cause. Therefore,

IT IS HEREBY ORDERED that the findings and recomendation filed by the

Magistrate in this cause on December 5, 1984, and the supplemental findings and recommendation filed by the Magistrate on March 25, 1985, be ADOPTED as the findings of this Court.

IT IS FURTHER ORDERED that the above-styled cause filed by the Plaintiffs shall be DISMISSED WITH PREJUDICE.

SIGNED and ENTERED this 15 day of May, 1985, at 10:00 A.M.

/s/ William S. Sessions
WILLIAM S. SESSIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MIRANDA BURTON, ET AL.,	)
	)
Plaintiffs,	)
	)
v.	
	)
GUS WILCOX, ET AL.,	)
	)
Defendants.	)

JUDGMENT

It appearing to the Court that this cause has been dismissed with prejudice,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this cause be DISMISSED WITH PREJUDICE and that the Plaintiffs shall bear all costs of Court.

SIGNED and ENTERED this 15th day of May, 1985, at 10:00 A.M.

/s/ William S. Sessions
WILLIAM S. SESSIONS
Chief Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2421
Summary Calendar

MIRANDA BURTON, By her Father, Next Friend, and Natural Guardian, CARLYLE BURTON; CARLYLE BURTON; PATRICIA BURTON; and NATHANIEL DENMAN,
Plaintiffs-Appellants,

versus

GUS WILCOX, ET AL.,
Defendants-Appellees.

Appeal from the
United States District Court
For the Western District of Texas

JUNE 30, 1986

BEFORE RUBIN, JOHNSON, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

FACTS

This case involves a six-year-old litigation for child support and custody

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

between the plaintiff, Carlyle Burton, and his ex-wife, Alloo Adams, concerning their child, Miranda Burton. The district court, adopting a magistrate's recommendations, dismissed the complaint with prejudice. We affirm. This court does not sit as a federal family law court.

In November 1980, Alloo Adams and her husband, Jerry Adams, moved to modify Carlyle Burton's support obligations and visitation rights to Miranda Burton. The Adams' attorney was Gus Wilcox, of the firm of Adams, Flake & Hrncir. Carlyle Burton hired B. Weldon Ponder, Jr., as his attorney. On January 26, 1981, Judge John Yates of the Bexar Courty district Court held a hearing on the motion. By that time Ponder had withdrawn from the case and Carlyle Burton apparently was relying on assistance from Nathaniel Denman who was not an attorney. Following

the hearing, Denman and Wilcox scuffled in the hall of the courthouse. Judge Yates held Denman in contempt and sentenced him to three days in jail, but later dropped the contempt matter after Denman agreed to apologize, although under protest, to Wilcox. Judge Yates issued an order increasing Burton's child support obligations and modifying his visitation rights.

Burton claims he attempted to appeal from that decision but that court clerks Tom Rickoff and Lorraine Willems "secreted and destroyed" the first appeal bond he sent and that they did not give him the statutorily prescribed amount of time to file a second bond. The Texas Court of Appeals dismissed the appeal on the ground that the appeal bond was filed too late. Burton unsuccesfully sought a writ of error in the Texas Supreme Court.

In August 1981, Burton unsuccessfully sought a writ of habeas corpus in a Texas district court to procure the court-orderd visitation with Miranda. Judge Kelly presided over the hearing, and Alloo Adams was represented by John Hrncir.

Alloo Adams then filed a motion to have Carlyle Burton held in contempt of court for child support arrearages. Judge Rivera presided and found Burton in contempt.

Burton, Denman, Burton's wife Patricia, and Burton acting as next friend for Miranda Burton filed this action in federal court in May 1981. The original complaint named Wilcox, Ponder, Wilcox's law firm, Judge Yates, court clerks Rickoff and Willems, court reporter Pollock, two "John Doe" bailiffs, and Alloo and Jerry Adams as defendants. All defendants moved to

dismiss the complaint under Fed. R. Civ. P. 12(b)(6); in addition, Judge Yates move for summary judgment. Following a hearing, Judge Shannon dismissed the claim without prejudice under Fed. R. Civ. P. 12(b)(6).

The Burtons and Denman then filed an affidavit of prejudice against Judge Shannon, alleging, inter alia, that as a state judge he had signed the original child support and visitation order in 1976. Judge Shannon disqualified himself and vacated all previous orders in the case. Judge Garcia, the next judge assigned to the case, recused himself after the Burton plaintiffs and Denman filed another affidavit of prejudice. The case finally came to rest in the court of Chief Judge Sessions who permitted the plaintiffs to file a verified further amended complaint and referred the case to a magistrate. The amended complaint

added as defendants attorney John Hrncir, Texas state court judges Rivera and Kelly, and Freny Bapuji (Alloo Adams's mother). There is not evidence in the record that Bapuji and Hrncir were ever served, although Hrncir has filed a brief in this court.

The district court adopted the magistrate's findings, following supplementation, and his recomendation to dismiss with prejudice. The court awarded costs to the defendants but made no statment concerning allowance of attorneys' fees pursuant to 42 U.S.C. Sec. 1988. Appellants filed a timely notice of appeal.[1]

THE TORT CLAIM

Appellants assert that the district court improperly dismissed their complaint without considering their tort claims, brought under the court's diversity jurisdiction. The only claim raised on

/1/ Although neither the district court nor the magistrate specifically addressed claims against John Hrncir, in dismissing the cause in toto, the district court implicitly adjudicated the rights of all the parties as required in a final judgment. See, e.g., Oswalt v. Scripto, Inc. 616 F.2d 191, 194-195 (5th Cir. 1980). Ths court thus has jurisdiction under 28 U.S.C. 1291.

appeal is the claim of intentional infliction of emotional "stress" due to the separation of Carlyle Burton and his daughter Miranda.

The federal court's jurisdiction over this claim must be based on diversity, 28 U.S.C. 1332. There is no "common nucleus of operative fact" between the tort alleged by plaintiffs anther their other claims. United Mine Workers of Americia v. Gibbs, 383 U.S. 715, 725; 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Plaintiffs have failed to allege the diverse citizenship of the defendants. Even if such diversity existed, however, this court ruled in

Jagiella v. Jaiella, 647 F.2d 561 (5 Cir., 1981) that a district court properly declined to exercise jurisdiction over a father's claim that his ex-wife had caused him mental anguish by alienating the affection of their child because it would necessitate the court's involvement in domestic issues, i.e. , ... (would) require inquiry into the marital or parent-child relationship." Id, at 565. Resolution of this dispute clearly will require inquire into the parent-child relationship. In Goins v. Goins, 777 F.2d 1095 (5th Cir. 1985), we reiterated this jurisdictional rule and noted further that it applies "even if the case also involves ordinary tort or contract claims." Id. at 1061. Thus the federal court is without jurisdiction over the claim.

The Burton plaintiffs generally allege that all the defendants conspired

against them to deprive them of visitation rights and to falsely imprison Denman. The specific allegations all include such phrases as "it was part of the conspiracy," "for the purpose of executing the conspiracy.' Such conclusory allegations cannot be the basis for relief. See Russell v. Millsap, 781 F.2d 381, 383 (5 Cir. 1985) (conclusory allegations of conspiracy do not state a cause of action under Sec. 1983). All allegations that do not state a state action or a class based discrimination component, therefore, were properly dismissed for failure to state a claim for relief under 42 U.S.C. Secs. 1983, 1985, and 1986. Only the claims containing such components are discussed below.

CLAIMS AGAINST THE JUDGES

Appellants have alleged that Three Texas state judges violated their

constitutional rights. They seek both damages and injunctive relief.

Most of the appellant's allegations of judicial misconduct concern Judge Yates. A state court judge is immune from damage suits under Sec. 1983 unless the acts complainted of were not judicial acts or were acts done in the clear absence of all jurisdiction. See Pulliam v. Allen, 466 U.S. 522; 104 S.Ct. 1970, 1978-1979; 80 L.Ed.2d 565 (19844). See e.g., Holloway v. Walker, 765 F.2d 517, 522-525 (5 Cir.), cert. denied, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985). All of the wrongs that Judge Yates allegedly committed during the modification proceedings and during the contempt proceeding were judicial acts; hence Judge Yates could assert immunity.

Appellants also hint at collusion between Judge Yates and Wilcox. Even if appellants' complaint were read to

suggest that Yates and Wilcox "fixed" the trial result, no facts have been pled to show such a collusion or to show that Yates acted outside his judicial capacity. See Sparks v. Duval County Ranch Co., 604 F.2d 976, 978 (5th Cir. 1979) (en banc), aff'd sub nom. Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

Appellants allege that Judge Kelly, an administrative Judge, acting along with John Hrncir and Alloo Adams, deprived Miranda and Carlyle Burton of their court-ordered visitation rights "by denial of due process and lies" during the August habeas corpus proceeding. This claim cannot be disposed of on judicial immunity grounds because it is possible, although highly unlikely, that Kelly was acting in the absence of jurisdiction if he was not properly assigned to hear domestic relations or habeas corpus

proceeding. See Tex. Civ. Stat. Ann. art. 200a Sec. 5a (Vernon 1969) (repealed Sept. 1, 1985). The dismissal of the claim against Judge Kelly was nonetheless proper because a bald allegation that the Judge denied Miranda and Carlyle Burton due process is insufficient to satisfy the factual pleading requirements of Sec. 1983. See Elliot v. Perez, 751 F.2d 1472, 1479-1480 & n.20 (5th Cir. 1985); Arsenaux v. Roberts, 726 F.2d 1022, 1023-1024 (5th Cir. 1982).

The claims against Judge Rivera stem from a September 8, 1981, hearing in which he held Carlyle Burton in contempt for, inter alia, refusing to pay $250 in attorney fees to Wilcox. As with Judge Yates, Judge Rivera, a state district court judge, had jurisdiction to hold Carlyle Burton in contempt and, therefore, to sign a contempt order. See Ex Parte Gornena, 595 S.W.2d 341, 845

(Tex. 19790. Signing, or failing to sign, a contempt order is a judicial act. Thus, Judge Rivera is immune from damages under Sec. 1983. See Holloway, 765 F.2d at 523. This immunity is not defeated by appellants' hints of collusion between Wilcox and Rivera. Id. at 522-523.

The district court did not err in refusing to grant injuntive relief. Appellants requested that all state orders based on perjured testimony be set aside, and that appellees be prohibited from interferring with visitation by the Burton appellants. In Kremp v. Dobbs, 775 F.2d 1319, 1321 (5th Cir. 1985), this court described a request that several state court rulings be vacated as "manifestly frivolous.' Appellants also are not entitled to a prohibition against interference with visitation. Under certain circumstances, such as if it were in Miranda's best interests, the Texas

judges could properly interfere with visitation. See Tex. Family Code Ann. Sec. 14.07 (Vernon 1975 & Supp. 1986). Thus, even though the judges are not immune from a request for injunctive relief, appellants have not demonstrated their entitlement to it; the claims for injuction were properly dismissed.

Appellants next argue that this case should be remanded to the district court to give them an opportunity to allege facts that would defeat judicial immunity. Appellants, however, have not alluded to a single specific fact that would undermine judicial immunity. This dispute has festered for several years, and if any facts supported appellants' position, they have had ample time to allege them. There is no need for a remand.

COURT CLERKS

Carlyle Burton alleges that court

clerks Willems and Rickoff hid or destroyed the first apeal bond he sent following Judge Yates' 1981 decision, and refused to allow him the statutorily mandated time to file a second appeal bond, which led to the dismissal of the appeal for the untimely filing of his second bond. This claim falls under Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 3204-3205, 82 L.Ed.2d 393 (1984), because he had and pursued an adequate remedy under state law; a writ of error to the Texas Supreme Court, which was denied.

Appellants contend also that Willems' and Rickoff's 40-day delay in filing their appeal "shocked the conscience." While some delays may amount to a due process violation, a forty-day delay is not of that magnitude. See Rheuark v. Shaw, 628 F.2d 297, 302-303 (5th Cir. 1980), cert. den. 450 U.S. 931,

101 S.Ct. 1392, 67 L.Ed.2d 365 (1981) assuming, without deciding, that an unjustified two-year delay in processing a direct criminal appeal violates due process. Appellants' further assertions regarding the appeal are meritless.

COURT REPORTER

Appellants assert they were denied their constitutional right to an effective appeal, in part because court reporter Don Pollock charged $2.75 per page for the transcript when the legal rate in Texas was $.84 per page. Violations of state law do not alone give rise to cause of action under the federal civil rights laws. See Williams v. Treem, 671 F.2d 892, 900 (5 Cir. 1982), cert. denied, 459 U.S. 1126, 103 S.Ct. 762, 74 L.Ed.2d 977 (1983). Appellants must also allege deprivation of a federally protected right. Id, Here, Appellants have not claimed that they

were unable to file their appeal because of the overcharge, or that $2.75 per-page charge is not rationally related to a legitimate state interest. They have not thus alleged they were "unduly" burdened to an extent sufficient to allege a valid due process clause violation. In re South, 689 F.2d 162, 165 (10th Cir. 1982), cert. denied, 460 U.S. 1069, 103 S.Ct. 1522, 75 L.Ed.2d (1983). In addition, they have not allelged that Pollock arbitrarily charged them more than for the transcript than he charged other persons. Therefore, they have not alleged an equal protection violation.

BAILIFFS

Denman alleged that Judge Yates illegally ordered bailiffs Moke and Watkins to take him into the jury room following his scuffle with Wilcox. He also claimed that Moke and Watkins required Denman to give them his belt and

that they threatened to put him in prison without written orders from a judge, clerk, or sheriff. Other complaints Denman raises are not properly before the court because they were not raised below. Gorenflo v. Texaco, Inc., 735 F.2d 835, 836 (5th Cir. 1984). Bailiffs share in judges' absolute immunity when they seize someone under his orders. Tarter v. Hury, 646 F.2d 1010, 1013 (5th Cir. 1981). Denman, thus, has no damage claim against the bailiffs for bringing him to the jury room. In uncontradicted affidavits, Watkins and Moke both stated they acted according to established procedure in taking Denman's belt from him, along with other personal items, which they returned to him after Judge Yates dropped the contempt procedings. No constitutional violation was connected with this action or any alleged verbal threats by the bailiffs.

OTHER DEFENDANTS

The other appellees are attorneys Wilcox, B. Weldon Ponder, Jr., and John Hrncir; the law firm of Adams, FLake and Hrncir; Alloo Adams, who is Carlyle Burton's ex-wife and Miranda Burton's mother; Jerry Adams, who is Alloo Adams' husband; and Freny Bapuji. None of these appellees acted under color of state law. See Polk County v. Dodson, 454 U.S. 312, 318; 102 S.Ct. 445, 449; 70 L.Ed.2d 509 (1981); Russel, 781 F.2d at 383 (Attorneys are not necessarily state actors even though they are officers of the court). These persons may be liable under Sec. 1983 only if they conspired with state actors. Dennis v. Sparks, 449 U.S. 244, 227-28; 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). Having reviewed appellants' vague and confusing allegations carefully, we find no specific facts that would support a find

- of conspiratorial conduct.

SECTIONS 1985 & 1986

Appellants also claim that they stated a cause of action under 42 U.S.C. Secs. 1985 and 1986. Claims under Sec. 1985 require allegations of class-based animus. Shelby v. McAdory, 781 F.2d 1053, 1054, n. 1 (5th Cir. 1986). The alleged classes of pro se litigants and new wives of divorced fathers were not identified to the trial court; hence, those allegations are not properly before this court. Gorenflo, 735 F.2d at 836. Because Sec. 1986 claims are dependant upon valid Sec. 1985 claims, Bradt v. Smith, 634 F.2d 796, 801-802 (5th Cir.), cert. denied, 454 U.S. 830, 102 S.Ct. 125, 70 L.Ed.2d 106 (1981), appellants' Sec. 1986 claims are also not properly before this court.

Appellants' complaints about the procedures followed by the magaistrate

and district court are meritless. We decline to rule on such other of their arguments as are asserted for the first time on appeal.

AFFIRMED

ON PETITION FOR REHEARING

AUGUST 15, 1986

EDITH H. JONES, Circuit Judge:

It is ordered that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is, hereby denied.